BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

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Joint Application of Comcast Corporation, Time Warner Cable Inc., Time Warner Cable Information Services (California), LLC, and Bright House Networks Information Services (California), LLC for Expedited Approval of the Transfer of Control of Time Warner Cable Information Services (California), LLC (U6874C); and the Pro Forma Transfer of Control of Bright House Networks Information Services (California), LLC (U6955C), to Comcast Corporation Pursuant to California Public Utilities Code Section 854(a).	Application 14-04-013 (Filed April 11, 2014)
And Related Matter.	Application 14-06-012 (Filed June 17, 2014)

REPLY COMMENTS OF THE JOINT INTERVENORS ON THE ALTERNATE PROPOSED DECISION DENYING APPLICATION TO TRANSFER CONTROL

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I. INTRODUCTION

Pursuant to Rule 14.3 of the California Public Utilities Commission's (CPUC or Commission) Rules of Practice and Procedure, the Administrative Law Judge's (ALJ) Rulings of April 30, 2015 and May 1, 2015,[1] and the ALJ Ruling of May 11, 2015,[2] the Office of Ratepayer Advocates (ORA), The Utility Reform Network (TURN), the Center for Accessible Technology (CforAT), Media Alliance and The Greenlining Institute (Greenlining) (collectively, "Joint Intervenors") submit these reply comments in support of the Alternate Proposed Decision Denying Application to Transfer Control (APD). Joint Intervenors fully support the opening comments of Greenlining, CforAT and the Writers Guild of America, West and the opening comments of the Joint Minority Parties.

Joint Intervenors disagree, however, with the positions set forth in the opening comments on the APD of the Joint Applicants.[3] Joint Applicants claim that the Commission cannot issue the APD (or the proposed decision (PD)) because that would constitute issuing an advisory opinion, that the Commission does not have jurisdiction to consider the broadband and voice over Internet protocol (VoIP) aspects of this merger under Section 706(a) of the 1996 Telecommunications Act, including concerns about consumer access to video and broadband content, content providers and Internet edge providers, and that the APD is based on a flawed competition analysis.[4] Joint Applicants claim that the APD is now moot and instead ask the Commission to grant its Motion to Withdraw Applications.

As discussed below, Joint Applicants' comments are replete with legal and factual errors and should not be considered. The Joint Intervenors strongly support the APD and encourage the full Commission to adopt it.

Even if the Commission does not wish to deny the merger at this point, the APD could be modified to remove the language denying the transaction and instead grant the withdrawal, subject

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[1] The ALJ's Rulings set the date for Opening Comments on the APD to May 4, 2015 and Reply Comments on the APD to May 11, 2015.

[2] The May 11, 2015 ALJ Ruling allows the Joint Intervenors to file their comments jointly, with a page limit of 25 pages.

[3] The Joint Applicants are Comcast Corporation (Comcast), Time Warner Cable, Inc. (TWC), Charter Communications (Charter) and Bright House Networks (Bright House).

[4] The APD was issued on April 10, 2015 and the Joint Applicants' filed their Motion to Withdraw on April 27, 2015.

to the conditions of withdrawal discussed below, and retain the remaining discussion in the APD.

II. DISCUSSION

A. The Commission Should Issue the APD

The Joint Applicants claim that any substantive decision on the proposed transfer of control would violate the Commission's policy against issuing advisory opinions.[5] The decisions cited by Joint Applicants state that the purpose of this policy is to "preserve scare resources."[6] For example, the cases that Joint Applicants reference cite to Decision (D.) 97-09-058, in which the Commission wrote:

> Since WEI [Women's Energy Inc.] no longer appears to require an order from this Commission determining the necessity of a CPCN, we will dismiss its application for rehearing. The application raises technical issues of statutory interpretation and federal constitutional law and we have some concerns about the Decision. However, we have a longstanding policy against issuing advisory opinions. *In order to conserve scarce decisionmaking resources, the Commission generally, "does not issue advisory opinions in the absence of a case or controversy."* (Re California-American Water Company (1995) [D.95-01-014] (Conclusion of Law No. 6); see also, Re Transmission Constraints on Cogeneration and Small Power Production Development (1993) D.93-10-026, pp. 4-5 (mimeo), abstracted at 51 Cal.P.U.C.2d 527, Re San Diego Gas and Electric Company (1994) [D.94-12-038] 58 Cal.P.U.C.2d 104, 105, Re San Diego Gas and Electric Company (1991) [D.91-11-045] abstracted at 42 Cal.P.U.C.2d 9.) The Commission adheres to this "rule" unless it is presented with "extraordinary circumstances." (Re Southern California Gas Company (1993) [D.93-08-030], 50 Cal.P.U.C.2d 518, 521.) If we granted the application, reconsidered this matter, and issued a subsequent opinion, effectively that opinion would be advisory. We do not believe it is an effective use of our decisionmaking resources to further pursue, at this point, the arguments WEI raises in its application. Therefore, we will dismiss the application for rehearing, as discussed below.[7]

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[5] Joint Applicants' Comments on APD at 4.

[6] *See, e.g*, D.98-03-038, D.99-08-018.

[7] D.97-09-058, *Application of Women's Energy Inc. for an Order Declaring Women's Energy, Inc. not subject to the Commission's jurisdiction.; Application of Women's Energy, Inc. for a Certificate of Public Convenience and Necessity to own and operate electric distribution facilities in the Golden Gate National Recreation Area, Presidio Unit*, Application No. 94-08-016 Filed August 11, 1994, Application No. 94-08-042 Filed August 23, 1994 1997 Cal. PUC LEXIS 786 at *5-6 (emphasis added).

The APD was issued on April 10, 2015 and the Joint Applicants filed their Motion to Withdraw on April 27, 2015. Thus, the APD was issued well before the Motion to Withdraw was filed. Joint Applicants' claim that the Commission should not issue a decision on the merits because they want to "preserve public resources" is without basis because parties have already expended significant resources and fully litigated the issues in these consolidated proceedings.

More significantly, the cases cited by Joint Applicants also reference D.97-08-016, which states that the Commission has issued advisory opinions where the matter was of widespread public interest and parties would benefit from a timely expression of the Commission's views, and the Commission did in fact issue an advisory opinion in that case. The Commission further elaborated:

> This motion seeks the issuance of an advisory opinion. In general, in order to conserve our scarce judicial resources, we do not favor issuing advisory opinions. (Carlin Communications, Inc. v. Pacific Bell, D.87-12-017, 26 CPUC2d 125, 130; Re California-American Water Company, D.95-01-014, 58 CPUC2d 470, 476.) We also disfavor issuing advisory opinions where the issue or controversy is not sufficiently developed to assist the Commission in reaching a reasoned decision.
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> *However, we have the discretion to issue advisory opinions, and have done so, where the matter was of widespread public interest, and where parties might benefit from a timely expression of our views.* (See In re SoCal Edison Co., D.93935, 6 CPUC2d 116, 136 (1981) [utility sought preliminary assurance from Commission that costs of a geothermal project reasonably allocated risks and benefits of geothermal development between utility and ratepayers; advisory opinion issued to resolve critical questions respecting the development of alternative energy sources, an issue very important to California ratepayers]; Carlin Communications, Inc., 26 CPUC2d at 130 [no act of wrongdoing alleged in complaint; Commission issued advisory opinion due to the widespread public interest in the operation of "live" 976 telephone service]; Re California-American Water Company, 58 CPUC2d at 476 [advisory opinion appropriate on matters of widespread public interest, especially when another governmental agency would benefit from a timely expression of the Commission's views; here, the issue was the Commission's assessment of standby charges for future water and sewer services, which issue was fully briefed by the parties].)[8]

[8] D.97-08-016, *Order Instituting Rulemaking on the Commission's Proposed Policies Governing Restructuring California's Electric Services Industry and Reforming Regulation.; Order Instituting*

Consistent with D.97-08-016 and the line of cases cited therein, the CPUC should adopt the APD here. Jurisdictional matters at issue in the pending consolidated Applications have been fully developed and briefed; these same issues have already been raised and will continue to be raised in other telecommunications matters.[9] It would be a substantial waste of Commission resources and inefficient for parties to start from square one again and re-litigate jurisdictional issues that have been fully addressed here. Instead of abandoning the completed work by both parties and policymakers done in this proceeding, the Commission should issue a decision on the merits in order to provide guidance on these jurisdictional questions and other substantive issues fully briefed here. This is particularly significant because it is unclear whether parties will be able to develop as robust a record in other merger and acquisition proceedings, or other matters involving similar jurisdictional issues, if intervenors are chilled from participation due to the risks of being denied intervenor compensation. If the Commission does not render a substantive decision in this matter, then in other ongoing and future Commission proceedings, intervenors will have to decide whether the risk of not even being eligible to receive intervenor compensation is great enough to preclude them from participating, thus potentially diminishing the range of input into some Commission proceedings.[10] Joint Applicants' overture that it will not contest parties' requests for intervenor compensation for their work in these proceedings fails to address these issues.

Collectively, these reasons satisfy the standard of "extraordinary circumstances" that the Commission referenced in D.97-08-016 and D.97-09-058. The jurisdictional issues addressed in the

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Investigation on the Commission's Proposed Policies Governing Restructuring California's Electric Services Industry and Reforming Regulation, Rulemaking No. 94-04-031 (Filed April 20, 1994), Investigation No. 94-04-032 (Filed April 20, 1994), 1997 Cal. PUC LEXIS 667 at *9-11 (emphasis added).

[9] *See, e.g.,* Frontier Acquisition of Verizon, A.15-03-005; Service Quality Rulemaking, R.11-13-001; LifeLine Rulemaking, R.11-03-013; potential merger of Charter and Time Warner Cable, http://www.washingtonpost.com/blogs/the-switch/wp/2015/04/24/after-comcasts-failed-bid-charter-wants-to-give-time-warner-cable-another-try/; http://www.theverge.com/2015/4/27/8505937/time-warner-charter-merger-2015; http://www.forbes.com/sites/antoinegara/2015/04/27/a-stock-loaded-deal-with-charter-is-time-warner-cables-best-option/

[10] *See* AT&T Petition for Writ of Review, Case No. No. A144005, filed January 22, 2015 (appealing D.13-05-031, affirmed by D.14-12-085 (awarding intervenor compensation to TURN) and D.14-06-026, affirmed by D.14-12-085 (awarding intervenor compensation to CforAT). After AT&T initiated its appeals of these decisions, the Commission issued D.14-12-061 (awarding intervenor compensation to Greenlining), D.14-12-60 (awarding intervenor compensation to the Utility Consumers' Action Network (UCAN)) and D.15-01-014 (awarding intervenor compensation to the National Asian American Coalition and Latino Business Chamber of Greater Los Angeles). AT&T has sought reconsideration of these latter two decisions in an anticipated prelude to appealing them as well).

APD are a matter of widespread public interest. Parties will certainly benefit from the timely expression of the Commission's views on the jurisdictional issues.

Even if the Commission does not wish to deny the merger at this point given that Joint Applicants have filed a Motion to Withdraw their applications, the APD could be modified to simply remove the language denying the transaction and instead granting the withdrawal, subject to the conditions of withdrawal discussed below. In this manner, the Commission could affirm the jurisdictional findings that were heavily litigated by parties and considered by the Commission in these proceedings without reaching the merits of whether the Commission should approve or deny the merger.

B. The Data Requests Responses in These Consolidated Proceedings Need to Be Preserved

Joint Applicants did not address the issue of preserving the data request responses in their opening comments. In an ex parte notice filed on May 5, 2015, Joint Applicants stated that "they will not object to the preservation of the record so long as any confidentiality concerns are properly addressed."[11] This statement does not address the primary concern of the Joint Intervenors.

As discussed in the Joint Intervenors' opening comments on the APD, since the Joint Applicants formally requested to withdraw their merger applications at the CPUC, two of the Joint Applicants, TWC and Charter, have revoked CPUC staff's, ORA's, Greenlining's and TURN's access to their responses to the Federal Communications Commission's (FCC) Requests for Information (FCC Responses), and the CPUC and other parties will likely lose access to the Comcast FCC Responses shortly. Joint Intervenors recognize that Joint Applicants do not wish to keep paying for and providing technical support for the Commission's, ORA's, TURN's and Greenlining's access to the FCC Responses, and are not asking Joint Applicants to do so.

Currently, Comcast's, TWC's and Charter's responses to the FCC Responses are not record evidence in these consolidated proceedings, and Joint Intervenors are not asking that the FCC Responses be submitted as record evidence. Rather, Joint Intervenors request that the Commission require the Joint Applicants to provide a full set of the FCC Responses, with the exception of the programming documents that have been the subject to an appeal in and recent opinion of the D.C.

[11] Joint Applicants' May 5, 2015 Notice of Ex Parte Communication with Advisors to Commissioners Randolph and Peterman at 3.

Circuit,[12] on a hard drive to ORA and to the CPUC's Legal Division. It is important that the CPUC preserve all data in its proceedings, and the FCC Responses are data that were used and relied upon by parties and the Commission in these consolidated proceedings.

In sum, the Joint Intervenors respectfully request that the APD be amended to require Comcast, TWC and Charter to provide full and complete sets of the FCC Responses on hard drives within 15 days of issuance of the APD or any decision issued in these consolidated proceedings to both ORA and the Commission's Legal Division, and have no objection to these documents being submitted under Public Utility (P.U.) Code section 583(c). This is necessary in order to preserve the data request responses in these consolidated proceedings. The Commission typically preserves this information.

C. Intervenor's Work in these Consolidated Proceedings should be Fully Eligible for Intervenor's Compensation

Joint Applicants stated that "qualifying Intervenors are entitled to seek reasonable contribution and will not object to qualifying Intervenors receiving such compensation for their efforts in the docket to date on the grounds that there is no final decision on the merits."[13] The Joint Applicants also state, however, that "[a]ny continued work would only improperly pad the costs of proposed intervenor compensation, while needlessly (and uneconomically) taxing the resources of the Commission."[14] If the Commission does not issue a decision on the merits of the merger (i.e., a decision approving or denying the merger), the Commission should require written agreement from the Joint Applicants that they will not contest, in any fashion, eligibility[15] for intervenors to receive intervenor compensation for any work conducted in these consolidated proceedings, including their work on the opening and reply comments on the APD, as well as any subsequent filings they might make in these proceedings.

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[12] *See CBS Corporation v. FCC*, Case No. 14-1242, D.C. Circuit Court of Appeals. Opinion issued May 8, 2015.
http://www.cadc.uscourts.gov/internet/opinions.nsf/3596BAD52F90C60E85257E3F00517D52/$file/14-1242-1551471.pdf

[13] Joint Applicants' Comments on APD at 6 (citation omitted).

[14] *Id.* (citation omitted).

[15] Any such agreement that Joint Applicants would not contest eligibility for compensation would not preclude their right to challenge individual time entries as incompensible.

D. Joint Applicants Should Reimburse ORA for the Cost of its Expert

Joint Applicants argue in their opening comments that the APD is moot and that the Commission should grant its Motion to Withdraw the consolidated applications.[16] If the Commission amends the APD to grant Joint Applicants' Motion to Withdraw, then the Joint Intervenors request that as a condition of withdrawal, the Joint Applicants be required to pay for the costs of ORA's expert, Dr. Lee L. Selwyn, for his detailed and important work in these proceedings.

ORA expended significant financial resources in order to bring in an expert to conduct a comprehensive competition analysis of the proposed transactions. The APD (and the PD) heavily relied on the analysis contained within Dr. Selwyn's Expert Report and Declaration, and it is clear that the Commission benefitted from the analysis that Dr. Selwyn provided.[17] ORA has a statutory obligation to advocate on behalf of residential and small commercial investor-owned utility customers in order to ensure that they receive the "lowest possible rate for service consistent with reliable and safe service levels."[18] The Scoping Memo in these consolidated proceedings asked parties, including ORA, to determine whether the merger is in the public interest and whether the merger would result in less competition in the California marketplace for broadband customers as compared to broadband customers nationally.[19] In order to fulfill its statutory obligations, ORA hired an expert to conduct a competitive analysis of the proposed merger; this is not expertise that ORA has in-house. By hiring an expert consultant, ORA was better positioned to achieve its statutory mandate and be responsive to the explicit goals in these proceedings to ensure the merger was in the public's best interest.

Because Joint Applicants have now filed a Motion to Withdraw and have demanded that the Commission not issue a decision on the merits in these proceedings, fairness requires the Joint Applicants to pay for the costs of ORA's expert, Dr. Lee L. Selwyn. This is a typical arrangement in merger and acquisition proceedings. For example, in the recent Frontier acquisition of Verizon, the

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[16] Joint Applicants' Comments on APD at 24.

[17] *See* APD at 39-47, 65, 67, 70-76. *See also* PD at 36-43, 6-69.

[18] P.U. Code § 309.5(a).

[19] Scoping Memo at 12-13.

applicants agreed to pay for the costs of ORA's consultant. ORA reached the same arrangement in the Verizon/MCI and AT&T/SBC mergers as well.

E. Jurisdictional Issues

Joint Applicants focus the bulk of their comments on jurisdictional issues. Jurisdictional issues are clearly live issues in these proceedings, and issuing an opinion on them would not be merely advisory. Thus, the Commission should, at a minimum, issue a decision affirming its jurisdiction to review the impact of the proposed merger on the deployment of broadband and VoIP services pursuant to Public Utilities Code section 854 and Section 706(a) of the 1996 Telecommunications Act.

1. P.U. Code Section 710

Despite a Scoping Memo,[20] a PD[21] and an APD that ruled that "[t]he authority granted to the Commission by Section 706(a) of the 1996 Telecommunications Act satisfies the requirement of express delegation under federal law set out in § 710 of the Pub. Util. Code,"[22] Joint Applicants still contend that Public Utilities Code (P.U.) Code section 710(a) "limits the Commission's subject matter jurisdiction by generally prohibiting the regulation of VoIP and Internet Protocol (IP) enabled services, including broadband."[23] Joint Applicants argue that the CPUC's authority over advanced communications extends only to the regulation of public utilities and that their entities deploying broadband are not public utilities under P.U. Code section 710.[24] Joint Applicants' understanding of P.U. Code section 710 is erroneous.[25]

P.U. Code section 710 contains clear exceptions to the limitation on regulating VoIP and IP enabled services:

> The commission shall not exercise regulatory jurisdiction or control over Voice over Internet Protocol and Internet Protocol enabled services *except as required or expressly delegated by federal law* or expressly directed to do so by statute or as set forth in subdivision (c).[26]

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[20] Scoping Memo at 21, 11-12

[21] PD at 21, 87, Conclusion of Law 5.

[22] APD at 84, Conclusion of Law 5. *See also* APD at 23-24.

[23] Joint Applicants' Comments on APD at 9.

[24] *Id.*

[25] http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201120120SB1161&search_keywords

[26] P.U. Code § 710(a) (emphasis added).

The CPUC is an agency embodied in the California Constitution,[27] and as such, has broad, far-reaching discretionary authority, though the Legislature can limit such authority, as it did with passage of P.U. Code section 710. However, even in enacting P.U. Code section 710, the Legislature has acknowledged the Commission's subject matter jurisdiction over VoIP and IP enabled services, while placing limits on that authority.[28] The legislative limits on CPUC authority in P.U. Code section 710(a) contain exceptions, and one of those exceptions is federally delegated authority. Joint Applicants' argument renders the exceptions provisions of P.U. Code section 710(a) meaningless. If the Commission could only act under the exceptions of P.U. Code section 710(a) if it already had the state legislative authority to act under that section, the Legislature would not have included the exceptions in the statute to allow for express delegations and requirements of federal law to apply.

2. Section 706(a) of the 1996 Telecommunications Act

Joint Applicants also disagree with the APD's holding that Section 706(a) of the 1996 Telecommunications Act (Section 706(a))[29] gives the Commission jurisdiction "to evaluate the broadband aspects of this merger."[30] Joint Applicants stated: "If Congress intended for Section 706(a) to grant both regulatory jurisdiction and authority to state commissions, it could and would have done so."[31] What Joint Applicants neglect to acknowledge is that Section 706(a) specifically provides state commissions, such as the CPUC, a specific grant of regulatory jurisdiction and authority. Section 706(a) states:

> The [Federal Communications] Commission *and each State commission* with regulatory jurisdiction over telecommunications services[32] *shall* encourage the deployment on a reasonable and timely

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[27] CA Const., Art. XII.

[28] If the CPUC never had authority over VoIP and IP-enabled services, then the need for P.U. Code section 710(a) would have never arisen.

[29] 47 U.S.C. § 1302(a).

[30] APD at 21.

[31] Joint Applicants' Comments on APD at 10.

[32] The 1996 Telecommunications Act defines Telecommunications as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." (47 U.S.C. § 153 (50).) The Communications Act defines "telecommunications service" as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." (47 U.S.C. § 153 (53).)

> basis of advanced telecommunications capability[33] to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.[34]

Section 706(a) applies to "*each State commission* with regulatory jurisdiction over telecommunications services," and the CPUC is the state commission in California with regulatory jurisdiction over telecommunications services.[35] Thus, clearly, the "advanced telecommunications capability" referenced in Section 706(a) is within the CPUC's subject matter jurisdiction, consistent with P.U. Code section 710. Section 706(a) grants parallel regulatory authority to the FCC and the states.[36] This reading was recently affirmed by the District of Columbia Circuit Court of Appeals (D.C. Circuit) in *Verizon v. FCC*.[37]

The Joint Applicants claim that "it defies logic" that the express delegation of authority in P.U. Code section 710(a) intended to incorporate section 706(a), which predates P.U. Code section 710(a), and that if the Legislature had intended Section 706(a) to apply, it would have expressly stated so in the enactment of P.U. Code section 710(a).[38] Joint Applicants' reasoning is faulty. First, that the Legislature did not specify every single federal law that applies under the exceptions clause of P.U. Code section 710(a) does not in any way support the Joint Applicants' position. The Legislature could not have possibly listed out every federal law that fit within the exceptions clause

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[33] Section 706 defines "Advanced Telecommunications capability" to include Voice over Internet Protocol (VoIP) and broadband. Federal statute provides at 47 U.S.C. § 1302(d)(1) that: "The term 'advanced telecommunications capability' is defined, without regard to any transmission media or technology, as high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology."

[34] 47 U.S.C. § 1302(a) (emphasis added).

[35] *See, e.g.*, Pub. Util. Code §§ 216, 233-236, 270-285, 871-887, 2871-2897.

[36] *Id.*

[37] *Verizon v. FCC*, 740 F.3d 623, 638 (D.C. Cir. 2014). *See also Order on In the Matter of Preserving the Open Internet; Broadband Industry Practices* (*Open Internet Order*), 25 F.C.C.R. 17905, 17968, ¶ 117 (2010). ALJ Bemesderfer supported this view at the PHC, noting that: "In [*Verizon v. FCC*], the D.C. Circuit affirms the FCC's interpretation of Section 706 as a grant of regulatory authority even though the decision itself rejects once again the FCC's attempt to formulate net neutrality rules." PHC Transcript at 11, lines 4-9.

[38] Joint Applicants' Comments on APD at 12.

in P.U. Code section 710(a). Furthermore, if the only exceptions that were meant to apply are those that were delineated in P.U. Code section 710(c), then the Legislature would not have included the language "*except as required or expressly delegated by federal law* or expressly directed to do so by statute"[39] in P.U. code section 710(a).

Second, the CPUC did not rely on Section 706(a) in the past, and Section 706(a) was likely not considered by the Legislature in its analysis of SB 1161 (codified as P.U. Code section 710) because the FCC had determined incorrectly in 1998 in its *Advanced Services Order* that Section 706(a) was only a Congressional statement of policy and did not constitute a specific grant of regulatory authority.[40] The FCC attempted to change its reading of Section 706 in its 2008 *Comcast Order*.[41] However, in 2010, the D.C. Circuit held in *Comcast v. FCC* that the FCC "'remained bound' by its prior interpretation" of Section 706(a) "[b]ecause the [Federal Communications] Commission had 'never questioned, let alone overruled, that understanding of section 706[].'"[42]

The FCC clearly overruled and rejected its prior incorrect reading of Section 706 in the *2010 Open Internet Order*, finding that "section 706(a) constitutes an affirmative grant of regulatory authority."[43] The D.C. Circuit upheld and affirmed the FCC's determination in *Verizon v. FCC* issued in January of 2014, holding that "section 706 of the 1996 Telecommunications Act . . . furnishes the [Federal Communications] Commission with the requisite affirmative authority to adopt the regulations [the *Open Internet Order* rules]."[44] The FCC again affirmed its authority to act under Section 706(a) in its recent *2015 Open Internet Order*.[45]

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[39] P.U. Code § 710(a) (emphasis added).

[40] *Advanced Services Order*, 13 F.C.C.R. 24012, 24044, ¶ 9 (1998).

[41] *In re Formal Complaint of Free Press and Public Knowledge Against Comcast Corp. for Secretly Degrading Peer-to-Peer Applications*, 23 F.C.C.R. 13028 (2008) (*Comcast Order).*

[42] *Comcast Corp. v. FCC*, 600 F.3d at 659.

[43] *2010 Open Internet Order*, 25 F.C.C.R. at 17969-70, ¶¶ 119-121.

[44] *Verizon*, 740 F.3d at 635. *See also Verizon*, 740 F.3d at 649 (finding "section 706 grants the [Federal Communications] Commission authority to promote broadband deployment by regulating how broadband providers treat edge providers . . . .").

[45] *Report and Order on Remand, Declaratory Ruling, and Order, In the Matter of Protecting and Promoting the Open Internet*, GN Docket No. 14-28, FCC 15-24. https://www.fcc.gov/document/fcc-releases-open-internet-order

Until the FCC effectively adopted the position that Section 706(a) is, in fact, a specific grant of authority in its *2010 Open Internet Order,*[46] the CPUC followed the FCC's erroneous conclusion in the *Advanced Services Order*. Moreover, until the D.C. Circuit upheld the FCC's determination regarding Section 706(a) in the *2010 Open Internet Order*, there was uncertainty about whether the FCC's conclusion that Section 706(a) is a grant of regulatory authority would be accepted. There is now no doubt that the CPUC has the authority to review the impact of the deployment of advanced telecommunications in California and that it *must exercise that authority*.

Joint Applicants claim that Section 706(a) at most authorizes a public utility commission to use the authority it already possesses under other provisions of law to advance the deregulatory policy that Congress pursued in Section 706(a).[47] Joint Applicants essentially argue that Section 706(a) has no purpose and effect. This view is at odds with the FCC's position on Section 706(a)[48] and with the D.C. Circuit's determination in *Verizon v. FCC* that Section 706(a) is a specific grant of regulatory authority to both the FCC and state commissions.[49] Joint Applicants' view is also inconsistent with the Senate Committee Report on the Telecommunications Competition and Deregulation Act of 1995 (Senate Committee Report).[50] The Senate Committee Report states that Section 706 is "intended to ensure that one of the primary objectives of the [1996 Telecommunications Act]--to accelerate deployment of advanced telecommunications capability--is achieved," and emphasized that Section 706 is "'a necessary fail-safe' to guarantee that Congress's objective is reached."[51] As the FCC observed, and the D.C. Circuit quoted in *Verizon v. FCC*, "[i]t would be odd indeed to characterize Section 706(a) as a 'fail-safe' that 'ensures' the [Federal Communications] Commission's ability to promote advanced services if it conferred no actual

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[46] *2010 Open Internet Order*, 25 F.C.C.R. at 17968-17971, ¶¶ 117-122.

[47] Joint Applicants' Comments on the APD at 11-12.

[48] *2010 Open Internet Order*, 25 F.C.C.R. at 17968-17971, ¶¶ 117-122.

[49] *Verizon*, 740 F.3d at 635.

[50] The Telecommunications Competition and Deregulation Act of 1995 was eventually adopted by Congress in 1996, and became known as the 1996 Telecommunications Act.

[51] Committee Reports, 104th Congress (1995-1996) Telecommunications Competition and Deregulation Act of 1995**,** S. Rep. No. 104-23, at 50-51 (1995). *See also Open Internet Order*, 25 F.C.C.R. at 17969-17970, ¶ 120; *Verizon*, 740 F.3d at 639.

authority."[52] The D.C. Circuit further observed that "when Congress passed section 706(a) in 1996, it did so against the backdrop of the [Federal Communications] Commission's long history of subjecting to common carrier regulation the entities that controlled the last-mile facilities over which end users accessed the Internet."[53]

Joint Applicants also claim that the APD has taken the position that the Commission has a nearly boundless delegation of authority over broadband Internet access. Joint Applicants mischaracterize the language of the APD and of Section 706(a). As the FCC noted in the *2010 Open Internet Order,* the authority Congress granted to the FCC and each state under Section 706(a) is limited to the following three factors: (1) regulatory actions that fall within the state's subject matter jurisdiction over such communications; (2) actions taken under Section 706(a) that "'encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans"; and (3) "activity undertaken to encourage such deployment [that] must 'utilize[e], in a manner consistent with the public interest, convenience, and necessity,' one (or more) of various specified methods" delineated in Section 706(a).[54] The FCC found that these limiting factors support the conclusion that Congress intended to grant substantive authority to the FCC and each state commission in section 706(a).[55] The Commission correctly recognized these limiting factors in its jurisdictional analysis on the APD.[56]

The Joint Applicants' argument that Section 706(a) cannot grant a state public utility commission power that the state legislature itself has not granted to it is also unsupported.[57] This is exactly what Congress intended in enacting Section 706(a) – Congress would not have added Section 706(a) if it did not actually confer any authority on the state commissions and the FCC. As the D.C. Circuit noted, "Congress has granted regulatory authority to state telecommunications commissions on other occasions, and we see no reason to think that it could have not done the same

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[52] *2010 Open Internet Order*, 25 F.C.C.R. at 17969-17970, ¶ 120. *See also Verizon*, 740 F.3d at 639.

[53] *Verizon*, 740 F.3d at 638.

[54] *2010 Open Internet Order*, 25 F.C.C.R. at 17970, ¶ 121 (citations omitted). In *Verizon*, 740 F.3d at 639-640, the D.C. Circuit only discusses the first two limitations, but not the third limitation. The D.C. Circuit reaches the same conclusion as the FCC that it is "satisfied that the scope of authority granted to the [Federal Communications] Commission by section 706(a) is not so boundless . . . . "

[55] *Id*.

[56] APD at 23.

[57] Joint Applicants' Comments at 10.

here."[58] Joint Applicants' argument would also render the exceptions provisions of P.U. Code section 710(a) meaningless. If the CPUC could only act under the exceptions of P.U. Code section 710(a) if it already had the authority under that section, then the Legislature would not have included the exceptions in the statute. Under Section 706(a), the CPUC has an obligation to review the impact of the merger on broadband deployment in California as Section 706(a) contains, in the D.C. Circuit's words, "a direct mandate."[59]

Furthermore, because Section 706(a) delegates specific authority to "each State commission with regulatory jurisdiction over telecommunications services," the CPUC does not need additional authority granted by the Legislature to have regulatory authority over deployment of advanced telecommunications.[60] Under the Supremacy Clause of the United States Constitution,[61] federal law can preempt state law:

> The supremacy clause of the United States Constitution establishes a constitutional choice-of-law rule, makes federal law paramount, and vests Congress with the power to preempt state law." Congress may exercise that power by enacting an express preemption provision, or courts may infer preemption under one or more of three implied preemption doctrines: conflict, obstacle, or field preemption.[62]

However, because P.U. Code section 710(a) contains exceptions to accommodate federal law requirements, the Commission does not need to address the issue of federal preemption in these consolidated proceedings.

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[58] *Verizon*, 740 F.3d at 638.

[59] *Comcast v. FCC*, 600 F.3d 642, 658 (D.C. Cir. 2010).

[60] 47 U.S.C. § 1302(a).

[61] U.S. Const. Art. VI., § 2. ORA notes that under Article 3.5(c) of the California Constitution, an administrative agency, such as the CPUC, does not have the authority "to declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations." However, because Section 710(a) provides an exception, there is no need for a Supremacy Clause inquiry.

[62] *Brown v. Mortensen*, 51 Cal. 4th 1052, 1059 (2011).

3. The Principles of Federalism Do Not Ba the CPUC's Review

Joint Applicants reference the "basic principles of federalism in the Constitution" in arguing that Congress and the FCC have established a deregulatory framework for interstate information services like broadband, and state commissions may not impose inconsistent regulation that undercuts that federal goal.[63] Contrary to Joint Applicants' assertions, the FCC's statement in the *2015 Open Internet Order* that broadband Internet access service is jurisdictionally interstate[64] has no impact on the CPUC's ability to review the proposed merger in a manner consistent with Section 706(a)'s objectives. The FCC also noted in the 2015 Open Internet Order that states "of course have a role with respect to broadband" and the fact that broadband Internet access service is jurisdictionally interstate does not by itself preclude all possible state requirements regarding that service.[65] As noted by the FCC and the D.C. Circuit, Section 706(a) is a specific grant of authority from Congress to each state commission.[66] And, as previously stated, Congress, the FCC, and the D.C. Circuit have all made it clear that Section 706(a) provides state commissions, such as the CPUC, with authority to review advanced communications deployment at a state level.[67] The FCC's recent *2015 Open Internet Order* does not change this analysis.

F. The APD Appropriately Relies on P.U. Code Section 709

Joint Applicants assert that the APD inappropriately relies on P.U. Code section 709 and that "the telecommunications policy goals of Section 709 do not and cannot override the express subject matter jurisdiction limitations imposed by the California Legislature on VoIP and broadband services in Section 710."[68] Joint Applicants misinterpret what the APD says with regard to P.U. Code section 709.

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[63] Joint Applicants' Comments on APD at 11.

[64] *Report and Order on Remand, Declaratory Ruling, and Order, In the Matter of Protecting and Promoting the Open Internet*, GN Docket No. 14-28, FCC 15-24 at ¶ 431. https://www.fcc.gov/document/fcc-releases-open-internet-order

[65] *Id*. at § 431, fn 1276 (citation omitted).

[66] *Open Internet Order*, 25 F.C.C.R. at 17968, ¶ 117; *Verizon*, 740 F.3d at 635.

[67] 47 U.S.C. § 1302(a); *Open Internet Order*, 25 F.C.C.R. at 17969-17970, ¶ 120; *Verizon*, 740 F.3d at 639.

[68] Joint Applicants' Comments on APD at 14.

The APD states that "both state and federal law, notably Section 706(a) of the 1996 Telecommunications Act and Section 709 of the Public Utilities Code, support the active monitoring of broadband competition in California, if not actions necessary to promote competition and remove barriers to investment."[69] In saying, this, the APD recognizes that P.U. Code section 709 is precatory language, i.e., that it is an expression of policy. However, given the FCC's recent reclassification of broadband as a telecommunications service under Title II of the 1996 Telecommunications Act in the *2015 Open Internet Order*,[70] P.U. Code section 709 should now apply with full force. With regard to the issues raised by the proposed merger, this Commission should now actively implement P.U. Code section 709(f), which provides that the State should "promote lower prices, broader consumer choice, and avoidance of anticompetitive conduct" and P.U. Code section 709(g) which declares that the State should "remove the barriers to open and competitive markets and promote fair product and price competition in a way that encourages greater efficiency, lower prices, and more consumer choice."[71]

G. The APD Applies the Correct Standard of Review and Burden of Proof

Joint Applicants contend that the APD errs in finding that the Commission should apply P.U. Code section 854(c) to the proposed transactions.[72] Contrary to Joint Applicants' position, the APD correctly determines that the Commission has jurisdiction over the proposed merger under P.U. Code section 854(c).[73] Joint Intervenors further agree with the APD's finding that "even if a plain reading of § 854(c) did not apply to this transaction, it is reasonable to consider the § 854(c) factors in helping us determine if this transaction is in the public interest" and that "the Commission is not limited to these factors in determining whether a proposed utility merger is in the public

[69] APD at 21. *See also*, APD at 24, 55.

[70] *Report and Order on Remand, Declaratory Ruling, and Order, In the Matter of Protecting and Promoting the Open Internet*, GN Docket No. 14-28, FCC 15-24. https://www.fcc.gov/document/fcc-releases-open-internet-order

[71] P.U. Code §§ 709(f), (g).

[72] Joint Applicants' Comments on APD at 15.

[73] APD at 16-18.

interest."[74] The APD further appropriately determined that "this Commission would be derelict in its duty to the people of California were it not even to consider the larger aspects of the utility transaction before it, a transaction that may in fact shape 'the future of communications' in California."[75]

Joint Applicants also contend that the APD commits legal error by asserting that "Section 706(a) imputes an independent burden of proof on the Applicants" and that "the burden of proof for the Transaction is derived solely from Section 854."[76] Specifically, Joint Applicants object to the following language in the APD: "the Joint Applicants must also show that the transaction does not interfere with the deployment of broadband infrastructure, as provided in Section 706(a) of the 1996 Telecommunications Act."[77] Joint Applicants then claim that Section 706(b) of the 1996 Telecommunications Act (Section 706(b)) "assigns the FCC alone the responsibility to determine 'whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion;' and further, if the FCC makes an adverse determination, Section 706(b) requires the agency to 'take immediate action to accelerate deployment' by removing barriers and promoting competition."[78]

Under Section 706(a), as discussed above, the FCC and state commissions, such as the CPUC, have parallel regulatory jurisdiction to "encourage the deployment on a reasonable and

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[74] *Id.* at 18. The APD's analysis is also supported by *In the Matter of the Application of SCEcorp and its Public Utility Subsidiary Southern California Edison Company (U 338-E) and San Diego Gas & Electric Company (U 902-M) for Authority To Merge San Diego Gas & Electric Company Into Southern California Edison Company*, D.91-05-028, 1991 Cal. PUC LEXIS 253 at * 15, stating: "Subsection (c) is ambiguous in one regard, but we now resolve that ambiguity. It is clear that the statute requires the Commission to consider each of the criteria listed in Paragraphs (1) to (7) before finding, on balance, that the merger is in the public interest. What is left unstated is whether the Commission is limited to these seven criteria or whether the Commission may assess additional elements in its balancing of the beneficial and adverse effects of the merger. We believe that it is reasonable to read the statute to require the Commission to consider the criteria listed in Paragraphs (1) to (7) but to permit evaluation of other factors in making its overall determination of whether the merger is in the public interest. So construed, Subsection (c) complements the Commission's previous authority and practice in cases involving the acquisition or control of California utilities. fn9 (fn9: We note that the listed criteria of Subsection (c) evolved from Commissioner Wilk's testimony in the legislative hearings that eventually led to SB 52. Commissioner Wilk testified that the Commission would consider many of these criteria in evaluating the proposed merger even in the absence of a specific statutory requirement.)"

[75] *Id.* at 20 (citation omitted).

[76] Joint Applicants' Comments on APD at 16.

[77] APD at 25. *See also* Joint Applicants' Comments on APD at 16.

[78] Joint Applicants' Comments on APD at 16-17.

timely basis of advanced telecommunications capability to all Americans" by taking "measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment."[79] This authority is not permissive; the FCC and state commissions, such as the CPUC, *must* exercise this authority. Therefore, the APD's statement that "the Joint Applicants must also show that the transaction does not interfere with the deployment of broadband infrastructure, as provided in Section 706(a) of the 1996 Telecommunications Act" is consistent with Section 706(a).[80]

Section 706(b), on the other hand, requires the FCC (and only the FCC) to open an inquiry to determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion, and if the FCC's finding is in the negative, it must take immediate action, including preempting states. Indeed, Section 706(b) is the authority the FCC relied on in its recent order preempting Tennessee's and North Carolina's municipal broadband restrictions.[81]

Sections 706(a) and Section 706(b) set forth a common purpose: under Section 706(a), both the FCC and state commissions are required to take regulatory measures to ensure that advanced telecommunications capability is being reasonably and timely deployed to all Americans, including adopting "regulatory measures that remove barriers to infrastructure investment." Under Section 706(b), the FCC, and only the FCC, is required to open an inquiry to determine if broadband is being reasonably and timely deployed to all Americans; essentially, Section 706(b)'s objective is to ensure that the FCC and state commissions are properly enacting Section 706(a); if they are not properly enacting Section 706(a), then the FCC must take further measures, including preempting states, under Section 706(b).

Lastly, The Joint Applicants also minimize this Commission's holding in *Northern California Power Agency (NCPA) v. CPUC* in their opening comments on the APD.[82] As the Joint

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[79] 47 U.S.C. § 1302(a).

[80] APD at 25. *See also* Joint Applicants' Comments on APD at 16.

[81] *Memorandum Opinion and Order*, *In the Matter of City of Wilson, North Carolina Petition for Preemption of North Carolina General Statute Sections 160A-340 et seq. and The Electric Power Board of Chattanooga, Tennessee Petition for Preemption of a Portion of Tennessee Code Annotated Section 7-52-601*, WC Docket Nos. 14-115 and 14-116, adopted February 26, 2015.
http://transition.fcc.gov/Daily_Releases/Daily_Business/2015/db0312/FCC-15-25A1.pdf

[82] Joint Applicants' Comments on APD at 15.

Intervenors noted in their opening comments, under *NCPA v. CPUC*, the CPUC is *required* to review the anti-competitive harms in every proceeding before it and is *required* to make findings on those anti-competitive effects, *whether the CPUC has jurisdiction or not*.[83] Thus, even if there is an issue that the Commission does not have jurisdiction over, and therefore, cannot adopt an order addressing the issue, the Commission must still review the anti-competitive effects and make findings of facts of its decision on that issue.

H. The Competition Analysis in the APD is Correct and Based on Record Evidence

The Joint Applicants contend that the APD contains a flawed competitive analysis of the broadband aspects of the proposed merger.[84] The record evidence in the proceeding demonstrates that the APD (and the PD as well) got it right on the competitive analysis. Joint Applicants' arguments should not be given any weight.

As the APD correctly notes, if the merger were approved, Comcast's broadband distribution network would *pass more than 84%* of all California households post-merger.[85] Of this *84%, 78%* of those households would have no other choice but Comcast as an Internet service provider capable of offering the FCC's minimum broadband speed standard of 25 Mbps download/3Mbps upload.[86] The FCC has made it clear that its definition of broadband is not aspirational or futuristic, as Joint Applicants claim,[87] but that it applies today. In adopting its new standard, the FCC stated in its 2015 Broadband Progress Report, which the APD takes official notice of,[88] that:

> 41. . . . When speeds of 25 Mbps/3 Mbps are available, a substantial and fast-growing number of consumers are adopting and migrating to higher speeds. . . . Customers are deciding for themselves at a very rapid rate that they need services at this or higher speeds.
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> 42. The fact that nearly one-third of consumers adopt 25 Mbps/3 Mbps when they have the option to do so supports our finding that

[83] *NCPA v. CPUC*, 5 Cal. 3d 370 at 377-378, 486 (1971).

[84] *Id.* at 17-24.

[85] ORA Brief at, e.g., 2, 27, 29 and Exhibit A, Expert Report and Declaration of Lee L. Selwyn Declaration at e.g., 13 and 153.

[86] ORA Brief at, e.g., 2, 27, 29 and Exhibit A, Expert Report and Declaration of Lee L. Selwyn at 71-72.

[87] Joint Applicants' Comments on APD at 21.

[88] APD at 40, fn 84.

> this offering is neither futuristic nor attractive only to a narrow set of heavy broadband users or early adopters. And they are migrating to 25 Mbps/3 Mbps at a
> remarkable rate.
>
> 45. Based on the record, we find that a 25 Mbps/3 Mbps benchmark reflects "advanced" telecommunications capability. We have recognized that the concept of broadband does not stand still, but instead must evolve and after a new and updated review of the market, we find that a speed
> benchmark of 25 Mbps/3 Mbps best captures the statutory definition envisioned by Congress.[89]

That broadband is now defined as 25 Mbps upload/3Mbps download is also reflected in California Assembly Bill (AB) 238, which would amend P.U. Code section 281 to define broadband as 25 Mbps upload/3 Mbps download.[90] The proposed legislation states, "[i]t is the intent of the Legislature to enact legislation to pursue the deployment of advanced telecommunications services with broadband speeds of at least 25 Mbps downstream and 3 Mbps upstream in all areas of the state."[91] Additionally, as Comcast's own economist has stated, "[s]o on the 25 megabits, I mean, I don't deny. I think Comcast agrees that we're all trying to move towards faster speeds. That's the motivation for the transaction."[92]

As the FCC recognizes, due to its lower speed, bandwidth caps, and usage-based pricing, mobile wireless broadband is not a competitive alternative to or a substitute for the Joint Applicants' wired broadband services.[93] Mobile wireless broadband also cannot fulfill the rising demand for functionalities such as: (1) the ability to do homework and to participate in remote

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[89] FCC's 2015 Broadband Progress Report and Notice of Inquiry on Immediate Action to Accelerate Deployment at 27, 28, 29, 32 (footnotes omitted). *See also* PD at 6 granting CforAT's Motion for Official Notice.

[90] Attachment A. http://www.leginfo.ca.gov/pub/15-16/bill/asm/ab_0201-0250/ab_238_bill_20150224_amended_asm_v98.pdf

[91] *Id.*

[92] FCC's Economic Analysis Workshop, Transcript at 131, Lines 6-9.

[93] The FCC agrees that mobile service data should not be part of the review of residential broadband subscriber figures and competition in the broadband market for this merger because "available data concerning mobile services appear to be unreliable and overstate deployment to a significant degree." ORA Brief, Exhibit 17, FCC Media Bureau Memorandum at 1 issued in MB Docket No. 14-57. The FCC also does not consider satellite in its analysis of the broadband market. *See* FCC's 2015 Broadband Progress Report and Notice of Inquiry on Immediate Action to Accelerate Deployment at 5. *See also* PD at 6.

video "virtual classrooms," (2) streaming HD video at a quality level sufficient for viewing on a large screen and, (3) running applications that require high bandwidth capacity in one or both directions. Due to its limited availability, technological and geographical constraints, and substantially higher price, fixed wireless broadband is also not a substitute for the Joint Applicants' broadband services. The level of "competition" that fixed wireless broadband represents is so minuscule as to have zero impact in constraining the market power of the Joint Applicants.

While Comcast and TWC claim they do not compete with each other, that claim is a result of their own choice not to compete on a physical infrastructure basis with regard to broadband; there is no legal or policy barrier to such competition. Comcast's and TWC's argument that they do not compete also fails to take into account that the broadband market is multi-sided as it serves consumers and it also provides the means for content providers to deliver services to their customers, content services that compete with those services that Comcast and TWC offer.[94] There are major and on-going changes that would give a post-merger Comcast, the largest operator of broadband services, the ability to control content and its distribution over the last mile high-speed Internet connections. Competition is growing in the market for over-the-top (OTT) broadband-delivered content, but TWC, a major competitive alternative to Comcast in this area, would be eliminated if the merger went forward. As Dr. David Sappington recently noted at the FCC's January 30, 2015 Meeting of Economists, "[w]hen you allow the two large ISPs to merge, they have the ability to impose a fatal blow, which they could not individually."[95] If the merger is not approved, however, Comcast and TWC are likely to compete with each other for the distribution of content to each other's customers over a high-speed Internet connection, and that competition will not be confined to their geographic footprint. But to use competing broadband-delivered content, consumers will still need to buy broadband access from Comcast. The APD recognizes this fact, and thus denies the merger.[96]

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[94] Some of the interested parties to this proceeding represent those content providers which are a major industry in California whether from the movie and television studios of Southern California or the electronic media sources of Northern California.

[95] FCC's Transcript of January 30, 2015, Proposed Comcast-TWC-Charter Transaction, MB Docket 14-57, Economic Analysis Workshop at 130, lines 4-8. http://apps.fcc.gov/ecfs/document/view?id=60001031131

[96] APD at 67-76.

Moreover, Comcast's ability to bundle video programming with a high-speed Internet connection can deter and negatively impact other Internet service providers (ISPs) to reasonably and timely deploy broadband in California. Other ISPs may not have the vertically integrated services that has enabled Comcast to be able to compete. As discussed above, the control of content will be a major factor in the ability of broadband systems other than Comcast to compete in California markets and to provide content at reasonable cost, if at all, to their customers. If one looks at the focus of the merger proceeding at the FCC, a major focus of discovery has been exactly on that topic.[97] It was also a major impetus for the adoption by the FCC of the *2015 Open Internet Order* on February 26, 2015.[98]

The near monopoly control of high-speed Internet that a post-merger Comcast would acquire would also give it the ability and the incentive to dictate pricing to consumers as well as limit consumers' ability to choose competing content. For example, Comcast has announced plans to eliminate flat-rate pricing of broadband in favor of usage-based billing, which will make competing over the top services more costly for consumers to use and thus less competitive.

Contrary to Joint Applicants' claims in its comments on the APD,[99] ORA's analysis of the impact of the proposed merger on competition is consistent with the Horizontal-Merger Guidelines (HMG) which "outline the principal analytical techniques, practices, and the enforcement policy of the Department of Justice and the Federal Trade Commission (the "Agencies") with respect to *mergers and acquisitions involving actual or potential competitors ("horizontal mergers")* under federal antitrust laws."[100] The HMG state that "[t]he Agencies measure market shares based on the best available indicator of firms' *future competitive significance* in the relevant market."[101] The HMG provide that a "relevant market" with regard to the proposed merger and related transactions

[97] For example, on 2/27/15, the FCC issued new data requests to seven content providers asking a several questions about contracts with online video distributors, and whether those contracts ever included provisions that limited the companies' ability to make agreements with other companies: http://transition.fcc.gov/Daily_Releases/Daily_Business/2015/db0225/DOC-332247A2.pdf

[98] http://www.fcc.gov/document/fcc-adopts-strong-sustainable-rules-protect-open-internet

[99] Joint Applicants' Comments on APD at 18-19.

[100] HMG at 1.

[101] *Id.* at 17.

in California includes over the top video services (i.e., online streaming video), which California consumers access via their broadband connection.[102]

III. CONCLUSION

The Joint Applicants' arguments against the reasons why the Commission should consider the APD for Commission vote and the substance of the APD are not based on sound legal or policy reasoning. Joint Intervenors enthusiastically support the Alternate Proposed Decision of Commissioner Florio. It is critical for the Commission to vote out a decision on the merits on this important matter as the APD addresses matters of widespread public interest and parties would benefit from a timely expression of the Commission's views. Joint Intervenors agree that the harms of the merger would be real and that there are no conditions that would fully mitigate the harms of the merger. If the Commission does not wish to issue a decision on whether to approve or deny the merger, then it should simply revise the APD to remove the language denying the merger, grant the Motion to Withdraw subject to the conditions expressed in these comments (and in the comments that will be filed on the Motion to Withdraw on May 12, 2015), but retain the analysis the Commission conducted on jurisdictional and other issues.

Respectfully submitted,

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[102] *Id.* at 7-8.

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